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**IT IS SO ORDERED.**

**Dated: May 02, 2011**



  
Burton Perlman  
United States Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

In re:	:	Case No. 09-10277
Richard E. and Mary Shaw	:	
Debtor(s)	:	Chapter 7
Eric W. Goering, Trustee,	:	Judge Burton Perlman
Plaintiff,	:	
vs.	:	Adv No. 10-1020
Green Tree Financial Services Corp.	:	
et al.,	:	
Defendants.	:	

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S CROSS MOTION FOR SUMMARY  
JUDGMENT**

In this adversary proceeding, arising in a chapter 7 bankruptcy case, Plaintiff Trustee seeks to avoid a first mortgage lien held by Green Tree Financial Services Corp. ("Green Tree".)

Now before the Court is a Motion for Summary Judgment brought by Plaintiff, and a Cross Motion by Defendant Green Tree. Plaintiff's Motion is supported by the Stipulation

of Facts (Doc. 35), Plaintiff's affidavit, and the claims register contained in Appendix No. 4. Green Tree's cross motion also looks to the Stipulation of Facts and the Entry Confirming Sale and Ordering Deed and Distribution, entered by the Brown County Court of Common Pleas of Ohio with attachments, including a copy of the subject mortgage. The issues before the Court are 1) whether a certificate of acknowledgment which fails to recite the grantor's name renders the mortgage avoidable; 2) whether the establishment of *lis pendens* within the 90-day preference period provides constructive notice of the mortgage to the Trustee; and 3) the effect of the sale of the property via the foreclosure process to Green Tree and Green Tree's subsequent sale of the property to a third party.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the general order of reference entered in this district. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K), (F) and (O).

Motions for summary judgment are governed by F.R.Civ.P. 56 which is incorporated into bankruptcy practice by F.R.B.P. 7056. That rule provides in part that a motion for summary judgment is to be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party bears the initial burden of showing that there is no issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986). The nonmoving party, however, bears the ultimate burden of showing that a genuine issue of material fact exists. In doing so, the nonmoving party cannot rest on its pleadings, but must, in response, offer some evidence which demonstrates a genuine issue of material fact for trial. Id.

## FACTS

The material facts are not in dispute. On January 13, 1999, Debtor Richard E. Shaw granted a mortgage on the subject property, 1719 Kress Road, Mt. Orab, Ohio, in favor of Green Tree. The certificate of acknowledgment on the mortgage is blank as to the grantor's name. On December 9, 2008, Green Tree initiated a foreclosure action in state court on the property.

On January 21, 2009, the Debtor filed his bankruptcy petition. Green Tree then filed its Motion for Relief From Stay. On February 27, 2009, the clerk entered a default order granting Green Tree's Motion for Relief From Stay. Green Tree did not seek an abandonment from the Trustee and the Trustee did not abandon the property<sup>1</sup> The Trustee was never added as a party to the state court foreclosure action.

On April 17, 2009, a judgment entry and decree in foreclosure was entered in the state court action. The property was appraised by the sheriff for \$85,000.00. At the July 13, 2009 sheriff's sale, Green Tree was the highest bidder, with a credit bid of \$56,667.00. The foreclosure sale was confirmed on August 25, 2009. Soon thereafter, Green Tree sold the property to Jared Smith for \$79,900.00. Green Tree received net proceeds of \$71,539.46 from the subsequent sale of the property.

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<sup>1</sup> This district has a streamlined procedure for obtaining an abandonment from a trustee. See Local Bankruptcy Rule 6007-1.

## DISCUSSION

### A. Mortgage Validity.

Included in the record before the Court is a copy of the mortgage document. The mortgage concludes with a signature by Debtor Richard E. Shaw and the names of two witnesses. Following this is an Acknowledgment, the printed form stating: "This instrument was acknowledged before me this", followed by the date. The second line contains the word "by" followed by a blank. In the blank, the notary has stamped his name. The Acknowledgment concludes with the signature of the notary. Nowhere in the Acknowledgment does the name of either debtor appear.

The law is well-settled in this district that the failure to identify the grantor as an acknowledging party in the acknowledgment clause renders the mortgage defective and, therefore, avoidable under 11 U.S.C. § 544(a)(3). In re Nolan, 383 B.R. 391 (B.A.P. 6<sup>th</sup> Cir. 2008); Countrywide Home Loans, Inc. v. Spaeth, Case No. 3-10-CV-120 (S.D. Ohio entered July 8, 2010)(Rose, J.)(affirming In re Highland, Adv. No. 09-3006)(Bankr. S.D. Ohio entered January 27, 2010)(Walter, J.); In re Burns, 2010 WL 3081338 (Bankr. S.D. Ohio 2010)(Humphrey, J.); In re Sauer, 417 B.R. 523 (Bankr. S.D. Ohio 2009)(Hoffman, J.). Therefore, the mortgage here in question is fatally defective, and is avoidable under 11 U.S.C. § 544(a)(3).

## B. Lis Pendens.

Normally, the establishment of *lis pendens* prior to the petition filing date imparts constructive knowledge of a defective mortgage to the Trustee, therefore protecting a mortgage from avoidance under 11 U.S.C. § 544(a)(3). In re Periandri, 266 B.R. 651 (B.A.P. 6<sup>th</sup> Cir. 2001). However, if the establishment of *lis pendens* occurs within the 90-day preference period, then the mortgage may be avoided as a preferential transfer, provided the Trustee satisfies his burden of proof as to all elements of 11 U.S.C. § 547(b). In re Gruseck & Son, Inc., 385 B.R. 799 at \*9 (B.A.P. 6<sup>th</sup> Cir. 2008). In the present case, the Plaintiff has established all six elements of a preferential transfer under § 547(b). Green Tree does not contest this position. Therefore, *lis pendens* is avoided and the defense fails.

## C. Damages.

Pursuant to 11 U.S.C. § 550, to the extent that a transfer is avoided under either § 544 or § 547, the trustee may recover, for the benefit of the estate, either the property transferred or the value of the property from the initial transferee. In the present case, because the property was subsequently conveyed by the initial transferee, Green Tree, to a third party, Plaintiff is seeking to recover the value of the transferred property from Green Tree rather than the property itself. Plaintiff contends that the best measure of the value of the property is the sale price of the property from Green Tree to the third party purchaser. We agree. That value here is \$71,539.46.

#### D. Remaining Defenses.

Green Tree contends that it no longer has any interest in the subject property. This may be true, but it is not a defense to an avoidance action. *See* 11 U.S.C. § 550 (trustee may recover the property or the value of the property). Citing In re Spaude, 112 B.R. 304 (Bankr. D. Minn. 1990), Green Tree contends that as a part of the state court foreclosure process, the state court “ordered” Green Tree to release its mortgage, and therefore, that there is no mortgage for Plaintiff to avoid. In re Spaude is distinguishable. In Spaude, the debtor wished to strip down a wholly unsecured second mortgage. The court held that because the property had been purchased by the second mortgage holder at the sheriff’s sale and the second mortgage holder was now the owner of the property, the debtor had lost his right to strip the mortgage under 11 U.S.C. § 506(d). In contrast to the instant action, Spaude did not involve an avoidance action by Trustee.

Green Tree also contends that the estate has no interest in the property. Specifically, Green Tree contends that since there were no proceeds to be distributed from the foreclosure sale, the property was effectively abandoned by the Plaintiff. Green Tree cites numerous cases for the proposition that if a foreclosure sale results in excess proceeds, the excess proceeds normally belong to the estate. While Green Tree has correctly cited the law, the cases cited do not support Green Tree’s position that a lack of proceeds from a foreclosure sale equates to an abandonment. Green Tree also asserts that because it obtained relief from the automatic stay, it was free to exercise its rights in the property free from any restrictions under 11 U.S.C. § 362(g). Again, Green Tree has correctly cited the law, but the cases cited

do not support its position. The lifting of the stay under 11 U.S.C. § 362 does not equate to an abandonment of the property by Plaintiff under 11 U.S.C. § 544.

Lastly, Green Tree contends that its mortgage is insulated from avoidance because a defective mortgage is valid and enforceable between the bank and its borrower, absent fraud. That proposition may be valid in actions by a debtor, as demonstrated by the cases relied upon by Green Tree. The proposition does not hold true, however, where it is a trustee who raises the question in a § 547 action.

\* \* \*

Accordingly, Plaintiff's Motion for Summary Judgment is GRANTED. Green Tree's Cross Motion for Summary Judgment is denied. Plaintiff is awarded a money judgment in the amount of \$71, 539.46 against Green Tree.

IT IS SO ORDERED.

copy to:

Debtors  
John A. Schuh, Esq.  
Adam M. Schwartz, Esq.  
David Demers, Esq.  
David H. Yungmans, Esq.

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